IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21082

DAVID MACHADO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

J. B. TIETZ AND
MICHAEL HANNON
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorneys for Appellant

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Table of Cases

RULES AND REGULATIONS

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21082

DAVID MACHADO,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

I

THE NO BASIS IN FACT POINT

Appellant's Reply Brief states that the Summary of the Department of Justice inquiry discloses six facts which support the Hearing Officer's statement that appellant was insincere (ARB 9][1] and adds two "incongruities" in appellant's statements which allegedly cast doubt upon his sincerity [ARB 12].

1. ARB refers to Appellant's Reply Brief.

Also the appellee asserts, "The registrant never contradicted the summary of the Department of Justice inquiry [Ex. 73, 76-83]" [ARB 8]. We invite the court's attention to the nine page, typewritten reply to the said summary, found in the Exhibit on pages 88 et sequentia, signed by both appellant and his then attorney, Mr. Daniel Marshall.

Appellant submits that none of the asserted supporting facts actually support the inference of insincerity that appellee would have us draw from them. We will examine each:

> "(1) The appellant's demeanor and credibility [Ex. 73];"

Neither the word "demeanor" nor any reference whatsoever to appellant's appearance or attitude appears on Ex. 73 or any place else in the Department of Justice summary. The insinuation that there was something wrong with appellant's demeanor, from which a negative inference might be raised, was imported into the case for the first time by appellee's brief.

Appellant concedes that the statement that the "Hearing Officer concluded that the registrant is not sincere" does appear at Ex. 73. Appellant quoted the same statement in his Opening Brief on Appeal (at page 15). This statement is the very statement that appellant complains is totally unsupported by the facts in the record. Appellee proves nothing by citing that naked conclusion.

> "(2) The imminence of induction at the time the claim was asserted [Ex. 74];"
>
> "(4) Appellant's delay in asserting his claim [Ex. 74];"
>
> "(6) The fact that appellant failed to assert the claim on filing his Classification Questionnaire in April, 1963, when the issue was raised on Part VIII of

> the form, although this was only six months prior to the time when the claim was asserted [Ex. 4, 7]."

These three points each restate in slightly altered language the same basic complaint: appellant did not fully develope his beliefs in early childhood—instead they were the result of a long process of evaluation which finally matured in a firm commitment to conscientious objection as the approach of induction forced appellant to make a decision.

In 1940, the Congress, upon reenacting conscription, abandoned the former [1917] requirement that a conscientious objector belong to one of the historic peace churches. The Congress thereby recognized that conscientious objection to war in any form is not necessarily learned at one's mother's knee. No time requirement was made in the 1940 act nor in the subsequent Act under which this prosecution is brought.

The Second Circuit recognized that the learning process by which a genuine conscientious objector arrives at his beliefs may be a process of maturation and crystallization. In *United States* v. *Gearey*, (2nd Cir., 1966) 368 F.2d 144, 150, the Court said:

> "It would be improper to conclude that an individual is not a genuine conscientious objector merely because his beliefs did not ripen until he received his notice[10] (Footnote 10: The Defense Department has recognized that a genuine claim of conscientious objection may arise even after induction. . . .) although the belatedness of the claim may be a factor in assessing its genuineness. The realization that induction is pending and that he may soon be asked to take another man's life may cause a young man finally to crystallize and articulate his once vague sentiments."

Although it may be a factor to be considered when the registrant has waited until after the Order to Report for Induction has been issued, as in *Gearey* (that is not the case with appellant), even then it is only a factor. As the Second Circuit has stated, it would be improper to draw a conclusion against appellant merely on that ground.

> "(3) The lack of public expression supporting appellant's views [Ex. 46, 74];"

This not entirely accurate statement of the facts reflects only another aspect of the situation discussed immediately above. It would be entirely unreasonable to expect numerous public expressions of a belief not yet formulated. There was no "lack" of such expressions in appellant's past but rather a history of a few such statements at scattered times. A letter submitted to the local board by David A. V. Moody, an instructor at Los Angeles City College and one of appellant's teachers, states that appellant had given a speech in his class on conscientious objection, entitled "Thou Shalt Not Kill" [Ex. 86]. The letter of another instructor [Ex. 85] and several of the statements made to the F. B. I. by various informants and summarized by the Department of Justice [Ex. 76-83] show that appellant was concerned with the subject and had spoken of it in private conversations. In the light of the rest of the facts showing that appellant's beliefs had matured over a period of time, an inference of insincerity drawn from the relative infrequence of such statements is an entirely unwarranted logical leap.

> "(5) The fact that appellant asserted the claim immediately after losing his status as a student for deferment purposes, and that he continued to consider seeking student deferment [Ex. 42, 58] [R. T. 109]."

As a basis for drawing an inference about appellant's sincerity, these facts are utterly worthless. The Selective Service Regulations (32 Code of Federal Regulations, hereinafter referred to as "The Regulations") state in Section 1623.2 that a registrant is entitled to the lowest classification for which his circumstances qualify him. The order of classifications from highest to lowest is set forth therein with Class I-A being the highest, followed by Class I-A-O and Class I-O (the conscientious objector classifications). Class II-S, the student's deferment, is a lower classification than either of those for conscientious objectors. It is entirely reasonable and logical that a conscientious objector who is also a student would prefer Class II-S since the objector is called and ordered to perform his alternative service at the time when he would normally be called for induction. The II-S classification would defer that call until the completion of his studies. There is nothing whatsoever inconsistent in a conscientious objector seeking a student's deferment.

Appellee also asserts two other grounds upon which to denigrate appellant's sincerity. ARB 12 states:

> "There are also incongruities in the registrant's statements and conduct which cast doubt on his sincerity. The registrant stated that he was trained in the basis for his beliefs by his parents from earliest childhood and that his experiences abroad had reinforced them [Ex. 46]. Yet the registrant told the hearing officer that he began to think about his values and attitudes at the age of 19, associating the event with the arrival of his first draft notice [Ex. 73]."

This imaginary doubt falls apart upon closer indpection of the facts as presented by the record rather than as paraphrased by appellee.

As appellant explained to the local board at his personal appearance [Ex. 58], his father was a minister recognized by a sect although without formal ordination. Appellant had rejected much of his family's religious beliefs, especially the theology of a "supreme being". Thus it is apparent that appellant did not simply adopt wholesale the attitudes and beliefs of his parents but went through a process of evaluation of the ethical and religious training he had received as a child.

The Hearing Officer himself noted that "He explained that it was not until the Fall of 1963 that he had fully made up his mind . . ." [Ex. 73].

Appellant did not begin to think seriously about his beliefs, the bases for which had been absorbed from his family during his childhood, until the government brought him face to face with the problem by sending him his first draft notice at age 19. This is entirely consistent with the picture of slowly maturing beliefs that he consistently presented and is in no way an "incongruity".

Appellee is again on weak ground when the reinforcement of appellant's developing belief, occasioned by his travels abroad, is cavilled at for not producing instant conviction [ARB 13]. That an event reinforced a ripening belief in no way implies that the reinforcement should immediately produce the final crystallization of that belief. Appellee's denigration of appellant's sincerity on this ground proceeds entirely from the false assumption that it should.

Appellee relies upon two cases, *Witmer* v. *United States,* (1955) 348 U.S. 375 and *United States* v. *Corliss,* (2nd Cir., 1960) 280 F.2d 808. Both of those cases contain many dissimilarities to the instant appeal and are distinguishable.

The major distinction between *Witmer* and the instant appeal is that Witmer claimed conscientious objector status (as one of Jehovah Witnesses) in his first Classification Questionnaire and thereafter did and said things inconsistent with that claim. Our appellant's belief did not fully mature until November, 1963, after which date nothing appears in the record that is inconsistent with his claim.

Three cases, consolidated for appeal, are reported sub nom *United States* v. *Corliss*. Convictions were affirmed in all three: Heise, Corliss and Harold. All are distinguishable on their facts.

In *Heise,* there was a "sudden accession of belief" which was considered to be a relevant factor but that factor was coupled with the registrant's inability to state the Biblical source for his alleged belief, on which he claimed to rely, without reference to typewritten notes. These notes appeared to be a copy of a letter that had been submitted to the local board. This latter fact created the strong inference that the notes and belief were the product of someone else's mind.

Corliss is interesting because it points out some of the things that the court considered "unimpressive" to establish a basis in fact for rejecting his claim on sincerity grounds. These include, inter alia, that the registrant had never been baptized in the sect whose tenets he claimed to hold and that he said he was seven or eight years old when he decided that he could not serve in the Army.

Contrary to appellee's contention, Corliss's conviction was not sustained because he lacked sincerity but because one element of a conscientious objector claim was missing. The Court cited two elements: (1) a personal conviction (2) based upon religious training and belief. There was "enough although barely enough" to sustain a finding that

Corliss lacked a "personal" belief in the conscientious objection tenents of his sect in that (a) he showed unfamiliarity with the scriptural references on which his claimed belief rested; (b) his minister father had helped him prepare his Special Form for Conscientious Objector; and (c) his answers had an impersonal quality.

All of the factual elements that were relied upon by the Court in *Corliss* are absent from the present appeal. No question was raised about the "personal" quality of appellant's belief.

In the third case, *Harold,* the court found a basis in fact in the synchronization of his interest in the Jehovah Witnesses with the Order to Report for Induction, coupled with the additional factor that he brought a witness to his personal appearance and also to his Hearing Officer hearing who prompted him in his answers. In our appellant's case, on the contrary, there is no suggestion that appellant's beliefs were someone else's rather than his own.

Witmer does, as appellee asserts [ARB 9], establish that insincerity is a ground for denying a conscientious objector claim but it does not stand for the proposition that insincerity is a basis in fact to deny a claim where the only "fact" is the fact that the Hearing Officer said he was insincere. There must be "facts which cast doubt on the veracity of the registrant . . . we must examine the *objective* facts before the Appeal Board to see whether they cast doubt on the sincerity of his claim". (348 U.S. 375, 381, 382, emphasis supplied).

Appellee cites a passage from *Corliss* to the effect that disbelief in a registrant's sincerity need not be accompanied "by any inconsistent facts provided the disbelief is honest and rational." (280 F. 2d 808, 814). This rather loose dictum of the Second Circuit appears to be incon-

sistent with the statement of the Supreme Court in *Witmer* that objective facts must support the disbelief (see supra). Immediately following the cited statement in *Corliss*, however, the Court goes on to cite a case holding that a registrant's demeanor in a personal appearance could support the disbelief (we note again that appellant's demeanor was not mentioned by the Hearing Officer as having anything to do with his conclusion that appellant was insincere). Furthermore, the Second Circuit stated:

> "On the other hand, to sustain the denial of a claim on a mere ipse dixit of lack of sincerity from the local board or the Hearing Officer would create serious possibilities of abuse . . . The Court, in effect, must determine, as best it can, whether the local board or the Hearing Officer and, ultimately, the appeal board were rational and sincere in disbelieving the sincerity of registrant's belief in the absence of conduct inconsistent with the registrant's assertion, . . ." (280 F.2d 808, 814).

Appellant respectfully submits that this language shows that the Second Circuit and the Supreme Court are not at odds over the question of the need for objective facts to support the Hearing Officer's assertion of disbelief in the registrant's sincerity. A disbelief not based on either the registrant's demeanor or on objective facts presented by his statements or history is not a rational disbelief.

Appellant, in his Opening Brief, relied on *Annett* v. *United States*, (10th Cir., 1953) 205 F.2d 689, 691, for the proposition that a mere statement that a registrant is insincere without stating relevant facts upon which such disbelief is based "does not rise to the dignity of evidence." Appellee attempts to distinguish *Annett* upon the grounds that while the finding of the Hearing Officer was in fact reversed, the finding of insincerity was not based upon personal observation [ARB 12]. There is no relevant dis-

tinction between the *Annett* and the instant case. In both cases, the Hearing Officer did not make any statement to the effect that he based his decision on the registrant's demeanor. In both cases, the Hearing Officer had ample opportunity to observe the demeanor of the registrant and to record his reaction to it, if any. Appellant here appeared before the Hearing Officer for an interview. *Annett* appeared before his Hearing Officer not once but twice for two separate interviews. Far from being a situation where the Hearing Officer had not made a personal observation, the *Annett* case was a situation where the Hearing Officer had more opportunity for personal observation than did our appellant's Hearing Officer.

Both in *Annett* and here, the Hearing Officer made the unsupported statement that the registrant was insincere. In *Annett,* the Court searched the record for something to support that statement and, finding nothing, reversed.

In *Annett,* the Hearing Officer had heard testimony from a witness who made the unsupported statement that the registrant was insincere. The reversal was not based on an improper reception of that evidence, as the Appellee here seems to argue, but on the absence of supporting facts plus the application of an erroneous standard. The basis for the Hearing Officer's statement in *Annett* was, if anything, stronger than that here.

Furthermore, as appellant pointed out in his Opening Brief (pp. 12-19), the Hearing Officer cited many improper standards: non-membership in a pacifist church, appellant's attitude regarding physical defense of himself and his family in the event of an attack, that he had stated "I don't know" in answer to the Supreme Being question, etc. Just as the possibility that the Hearing Officer had relied upon the unsupported opinion of the witness tended to

vitiate the Hearing Officer's statement in *Annett*, so here, the Hearing Officer's express citation of improper standards as factors influencing his opinion, vitiates his statement that appellant was not sincere.

There being no basis in fact for a finding of insincerity, there is no basis in fact to deny a conscientious objector classification to appellant. Thus the denial of that classification to appellant was arbitrary, capricious and contrary to law. A conviction based upon such a classification should not stand.

II

APPELLANT WAS DENIED DUE PROCESS BY THE MANNER IN WHICH THE HEARING OFFICER'S HEARING WAS CONDUCTED WHICH DEPRIVED HIM OF THE OPPORTUNITY TO HAVE BOTH HIS WITNESSES SPEAK

Even though the Court believed the Hearing Officer's testimony that he told the witnesses that only one of them would be permitted in the room at a time, this does not reach the heart of the matter. It is not disputable that the witnesses understood him to say that only one would be allowed at all (see Opening Brief pp. 19-21). Furthermore, it should be noted that this was a mere observation by the District Judge and not a formal finding of fact as such findings were waived by stipulation as is the unvarying custom in criminal trials by the court sitting without a jury in the (Southern District, Central Division) Central District of California.

Appellee cites *Uffelman* v. *United States*, (9th Cir., 1956) 230 F.2d 297, for the proposition that a refusal by a Hearing Officer to hear a proffered witness would not be a violation of the registrant's constitutional or statutory rights. This case predicates its reasoning on the statement,

"Proceedings before a Selective Service Board are not a trial." (p. 303).

Be that as it may, even a Selective Service registrant should be entitled to have a trial on the facts somewhere before he is deprived of his liberty and confined in a federal prison. In the District Court, he is faced with the well established rule that any basis in fact will support the ruling of the Selective Service System. If he is not entitled to something analogous to a trial as recognized by English and American law at some point in the administrative procedure, then the federal courts are reduced to rubberstamping an administrative fiat that the man be deprived of his liberty.

Furthermore, it should be noted that *Uffelman* concerned denial of witnesses at a personal appearance before a local board. In the instant case, we are dealing with the denial of an effective opportunity to present a witness at the hearing before a Department of Justice Hearing Officer. Such Hearing Officer, unlike most local board members, is an attorney and not likely to be confused by trial-like procedures.

Abbreviated procedures, such as those here, have often provoked District Judges. In *United States* v. *Glessing,* (U.S.D.C. Minn., 1951) No. 8173, Judge Matthew M. Joyce stated (at page 3 of the partial transcript):

> ". . . Why this Board didn't hear these three witnesses that the young man brought in I don't know. I don't know whether their story would have been an elaboration of what he had already told the board or if it was supporting testimony which might have gone into greater detail than he had presented which might have disclosed facts which if the board knew them might have caused them to change his classification. It doesn't seem to me that it is quite the American way

to slap down a man and say we won't hear you at all about this thing. He was there; he was earnest; he was trying to get their story to the board. What the story was I don't know. He doesn't know now because he wasn't permitted to use them and the board doesn't know or didn't know because the board wouldn't proceed to hear them."

In *United States* v. *Walter Kobil*, (U.S.D.C. E.D. Mich., 1951) No. 32,390, District Judge Frank A. Picard stated (at page 4 of the partial transcript):

". . . He said he wanted to be heard. He came down there with two witnesses. They wouldn't let the witnesses in.

"That was wrong, unless it appeared that his witnesses were creating some kind of disturbance or were there for the purpose of preaching Jehovah's Witness doctrines. But they might have been there to show that he was on the corner and sold tracts, or that he went from door to door, and they might have been there for the purpose of showing that he was a conscientious objector and yet the board never heard them. That is wrong; absolutely wrong and un-American. The boards might as well find it out now as anytime.

"Now the fact that this man won't salute the flag makes my blood boil; and the fact that he won't fight for his country also makes my blood boil. But that hasn't anything to do with this, . . ."

If *Uffelman* is to be rigorously followed, a registrant is placed in a closed circuit. He is denied a trial on the facts in the District Court by the narrow scope of review doctrine and he is denied a trial on the administrative level by the dictum that such proceedings "are not a trial." Thus he is sent to prison without ever having had a trial and an opportunity to fully develop his side of the case, to explain

and rebut apparently derogatory information about himself by presenting witnesses in his favor.

In *Uffelman* a hearing before the local board was involved. In our appeal a hearing before a Hearing Officer is involved. The applicable regulations are vastly different.

Local Board: The rules for this hearing are found in 32 C.F.R., Part 1624:

"Part 1624—Appearance Before Local Board

"1624.1 Opportunity to Appear in Person.—(a) Every registrant, after his classification is determined by the local board except (1) a classification which is determined upon an appearance before the local board under the provisions of this part or (2) a classification in Class I-C, Class I-W, Class IV-F, or Class V-A, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended.

"(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may be represented before the local board by anyone acting as attorney or legal counsel."

We state to the Court, going outside the record, that all the boards, with rare exception, uniformly interpret the above rules to permit them to forbid the registrant *any* witness and that for the last past 30 months they have uniformly been forbidding witnesses.

Hearing Officer: The rules for this are in the Instructions to all Department of Justice Hearing Officers Appointed Pursuant to the Universal Military Training and Service Act and are found in Departmental Memorandum No. 41.

The standard, printed invitation to the registrant is set forth in Appendix A.

We state to the Court we have appeared with many registrants at such hearings. At some of these hearings as many as ten or a dozen friends of the registrant were admitted; at none was the attendance limited to 1 or 2 at a time.

III

APPELLANT'S DUE PROCESS POINTS WERE RAISED DURING TRIAL AND SHOULD BE CONSIDERED ON APPEAL

Appellee argues that no issue was raised during trial by appellant as to the two denials of due process of law that occurred at the Induction Station [ARB 15].

Not only were these issues raised during trial but they were raised by appellee. Both issues appear on the face of the records contained in the Selective Service file which the appellee introduced and which was received in evidence as the Appellee's Exhibit.

Appellee offered the whole Selective Service file for the Court's consideration and the whole was received. Appellee did not select from the file those facts tending to show that appellant had been ordered to submit for induction and had refused. Instead, appellee offered the whole and let the trial judge ferret out those facts for himself.

Appellee now implies that the Court, in viewing the evidence appellee offered, should close one eye and only

see those facts favorable to appellee's case. The government stands on weak ground when it asserts that the District Judge was not given an opportunity to consider facts which the government itself presented to the Court.

Similarly, if the appellee now relies on some implied waiver by appellant of the due process issues raised by the evidence the government itself presented, then the appellee has the burden of proving the existence of such a waiver.

Appellee cites two cases to support the contention that points not raised in the District Court cannot be raised on appeal. Neither holds that a point raised in the District Court in the manner that appellant's due process points were raised cannot be relied upon on appeal.

In *Elder* v. *United States,* (9th Cir., 1953) 202 F.2d 465, the defendant did not raise at trial his point that the FBI report to the Department of Justice had not been placed in the Selective Service file. He raised the question on appeal and the Court said:

> "The record before us includes the file and an examination of the latter discloses that it does not contain the report. While normally the Court will not consider points not presented below, we think that in the posture of the present case the question now raised should in fairness be noticed, more particularly because the Second Circuit has recently held that the failure to place the FBI report in the file constitutes a violation of § 6(j) of the Act, and renders the proceeding a nullity. *United States* v. *Nugent,* 2 Cir., 200 F.2d 46." (p. 468)

Appellant's file, on the other hand, does raise the points because the documents showing failure to comply with the Regulations (the physical examination forms and the DD Form 98) are contained in the file. Thus, the factual situation in *Elder* was one step beyond the situation presented

here. There the point concerned the absence of evidence from the file the government presented, here the points concern evidence present in the file introduced by the government.

The other case cited by appellee, *Robbins* v. *United States,* (9th Cir., 1965) 345 F.2d 930, is not in point at all with the present situation. There, a bank robber complained on appeal that the sentence imposed was beyond the statutory limit. He had not made a motion for reduction of that sentence in the trial court. The appellate court refused to consider the point because it was still possible to raise it in the District Court, an illegal sentence being correctible at any time.

Here, of course, there is no way to have the District Court correct its error, it cannot acquit appellant on the basis of the two denials of due process unless the appellate court takes cognizance of the questions presented.

The other four cases cited by appellee on this point show that the general rule, that matters not raised below may not be raised for the first time on appeal, is a rule that depends on the specific fact situation for its applicability.

In *Ramiriz* v. *United States,* (9th Cir., 1951) 294 F.2d 277, the defendant did not complain of an instruction at the time it was given, despite Federal Rule of Criminal Procedure 30 which requires an objection to raise an issue as to instructions. The Court, however, stated, "In any event, the charge was proper," indicating that the Court considered the question despite the fact that it had not been sufficiently raised. Also, the entrapment point could not be raised on appeal because the defendant had refused an instruction on entrapment in the District Court.

In *United States* v. *Miller,* (8th Cir., 1963) 316 F.2d 81, the appellant shifted the ground of his Constitutional objection from the ground on which he relied in the trial court to a new and different ground on appeal.

In *Tyree* v. *United States,* (5th Cir., 1965) 351 F.2d 611, appellant attempted to rely on an allegation that he had been required to take affirmative action while in a police line-up to help the witness identify him. Facts to support this contention had not been developed in the trial court. (In the instant case all the necessary facts to establish, prima facie, the denials of due process were presented to the court by the government's exhibit; any failure to rebut those facts should be laid at the feet of appellee.)

Finally, in *Grant* v. *United States,* (9th Cir., 1961) 291 F.2d 746, no instruction on entrapment was requested or given and the appellate court held that that was a prerequisite to raising the question on appeal.

On the instant appeal, we have two glaring denials of due process shown by evidence which the government itself presented to the District Court. It would be unfair to appellant to refuse to consider them, especially in light of the fact that the government does not deny their existence.

Furthermore, the Ninth Circuit has often taken the position that it is free to do justice and has repeatedly taken cognizance of points not raised at all in the trial court. It has considered points raised for the first time on oral argument. For example, see *Chernekoff* v. *United States,* (9th Cir., 1955) 219 F.2d 721, 724:

> "It was said in argument that this omission is in consonance with the practice in Los Angeles County. . . ."

* * *

> "Likewise, in the course of argument, it was represented and unchallenged that the derogatory information in appellant's file as to appellant's religious sincerity concerns a single conviction for drunkenness and another for speeding. . . ."

In *Daniels* v. *United States*, (9th Cir., 1967) 372 F.2d 407, the court sitting en banc stated:

> "During oral argument, counsel for Daniels contended, for the first time in this case, that it was unfair for the Selective Service System officials not to advise Daniels. . . .
>
> * * *
>
> "In view of our holding announced above that Daniels is entitled to assert his defense based on the contention that the classification is invalid, we need not decide this additional question."

Appellee asserts (ARB 18-19) that the denials of due process did not prejudice appellant. In light of the fact that a shockingly high per cent of those given armed services physical examinations fail them and that appellant was not given the opportunity to take the final examination (and thus be spared the choice between violating his conscience and risking a long federal prison term), the assertion that he was not prejudiced is thin indeed. The prejudice is patent.

Similar is the Induction Station's failure to offer appellant an opportunity to accomplish DD Form 98 before ordering him to submit to induction. The armed services think this Security Questionnaire to be of sufficient importance that the applicable regulation governing Induction Station procedures (Army-Regulation 601-270) provides in Section 80 B (2):

> "A registrant who qualifies or refuses to accomplish the DD Form 98 in its entirety (see AR 604-10) or who discloses significant derogatory information with respect to his background, or who invokes constitutional privileges . . . will not be inducted into the Armed Forces pending completion of a thorough investigation."

We do not know if appellant would have failed or refused to sign the DD Form 98 because he was never given the opportunity to do so. If he had been given the opportunity and had failed or refused, he could not have been ordered to submit to induction at that time. The Army did not give him that opportunity but instead rushed him to his choice. Again, the prejudice is patent.

Far from being the "technical procedural objections" which appellee characterizes them, these two failures to follow their own Regulations deprived appellant of significant opportunities to escape the position where his commitment to his principles forced him to risk prison.

Respectfully submitted,

J. B. TIETZ and
MICHAEL HANNON
Attorneys for Appellant

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ AND
MICHAEL HANNON
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorneys for Appellant

MAY 19, 1967

APPENDIX A

ADDENDUM No. I TO INSTRUCTIONS TO SPECIAL HEARING OFFICER FOR THE DEPARTMENT OF JUSTICE IN CONSCIENTIOUS-OBJECTOR MATTERS

Notice of Hearing and Instructions to Registrants Whose Claims for Exemption As Conscientious Objectors Have Been Appealed

1. Pursuant to the provisions of section 6(j) of the Universal Military Training and Service Act (50 U.S.C. App. 456(j)), hereinafter referred to as the Act, and section 1626.25 of the Selective Service Regulations, the Department of Justice will make an inquiry and hold a hearing with respect to the character and good faith of the registrant's objections to training and service under the Act on the ground that the registrant is conscientiously opposed to participation in war in any form. The scope of the hearing is restricted to consideration of the merits of the conscientious-objector claim only. Consideration of ministerial claims and all other claims is within the exclusive jurisdiction of the Selective Service System.

2. The hearing will be conducted by the undersigned, a Special Hearing Officer for the Department of Justice, appointed by the Attorney General of the United States.

3. It is incumbent upon the registrant to establish that he is entitled to the conscientious-objector classification he claims. The registrant has a right to appear at the hearing and make a full and complete presentation of his claim. The registrant may testify orally and may present witnesses in support of his claim. However, no

Government funds are available for the payment of witness fees or travel expenses.

4. The registrant may also submit at the hearing written statements or documents, or certified copies thereof, in support of his conscientious-objector claim. Written statements shall be sworn to or affirmed before a notary public or other persons authorized to administer oaths. Such statements or documents will be considered for whatever bearing they may have upon the registrant's conscientious-objector claim. They will not be considered in connection with any other claim whatsoever.

5. Attached hereto is a resumé of the information developed by the inquiry conducted pursuant to the aforementioned Act. If the registrant wishes to deny, explain, or otherwise comment upon any information contained in the resumé, he should do so in a written statement to the Hearing Officer. At the hearing the registrant will be entitled to discuss the information contained in the resumé and to present witnesses to refute or corroborate such information.

6. The hearing will not be in the nature of a trial or judicial proceeding, but will be informal and non-legalistic. Technical rules of evidence will not apply at the hearing, but reasonable bounds will be maintained as to relevancy and materiality. In addition to his witnesses, the registrant may have an attorney, relative, friend, or other adviser present at the hearing. Such person, whether an attorney or not, will not be permitted to object to questions, or to make any arguments concerning the proceeding. In order that the conduct of the hearing may comport with the necessary requirements of dignity, orderliness, and expedition, the Hearing Officer will be the sole judge in the matter of

choice of a method of procedure designed to effectuate the desired result.

7. Failure to comply with these instructions may result in the termination of the proceeding.

.....

Special Hearing Officer
for the Department of Justice